Hoosier Environmental Council

Sierra Club
Founded 1892

Environmental Law & Policy Center

August 1, 2013

Gina McCarthy
Administrator
Mail Code: 4101M
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Petition for Corrective Action Regarding the Indiana NPDES Program – New Information on Indiana Department of Environmental Management's Refusal to Comply with NPDES Permit Requirements When Allowing Pollution under General Permit Rules.

Dear Administrator McCarthy:

On December 17, 2009, Hoosier Environmental Council, Sierra Club and the Environmental Law and Policy Center (ELPC) filed a petition under 40 CFR § 123.64 to correct serious defects in the Indiana water program (hereinafter "Dec. 17, 2009 Petition"). A major portion of the Dec. 17, 2009 Petition concerned the Indiana general permit rules that were adopted outside the federally-sanctioned procedures for adoption of general permits (40 CFR Part 124), which were instead adopted by rule by the Indiana Water Pollution Control Board.

Meanwhile, on June 30, 2010, Sierra Club (with ELPC acting as counsel) challenged the use of Indiana's "Rule 7" (327 IAC 15-7) to permit pollution discharges from the largest coal mine in the eastern United States, the Bear Run Mine. On November 17, 2010 USEPA Region 5 independently submitted a letter to IDEM recommending that IDEM require an individual permit for the Bear Run Mine. Nonetheless, IDEM has continued to allow the Bear Run Mine to discharge under the illegal "general permit rule." The permit appeal is now fully briefed, and we await a decision by the Indiana Office of Environmental Adjudication.

During the course of briefing the Bear Run Mine appeal, IDEM has taken legal positions that further demonstrate its disregard for Clean Water Act authority. We write now to apprise USEPA of IDEM's positions as USEPA considers our pending Petition for Corrective Action. IDEM's continued failure to comport with the federal minimum standards for the issuance of a valid NPDES permit is clearly grounds for program withdrawal. 40 CFR § 123.63(a)(2)(ii) and (5).

In its Response to Sierra Club's Motion for Summary Judgment[1], IDEM argues that, if a conflict exists between the Indiana regulation requiring all NPDES permits to comply with Clean Water

[1] Attached as Exhibit 1.

Act requirements and the Indiana regulation IDEM has been using to permit discharges from coal mines, then the more specific regulation (the "general permit rule") prevails.[2] In other words, IDEM believes that it can permit discharges under its "general permit rules" that do not comply with Clean Water Act NPDES requirements.

In the same document, IDEM also takes the position that it does not have the authority to undertake basic duties under the NPDES program. IDEM argues that it can only consider whether specific requirements of the general permit rules have been met.[3] These requirements are basically limited to an inquiry of whether the applicant has completed all of the blanks on the notice of intent (NOI) letter form. IDEM further argues that it does not have the authority to require the applicant to submit additional information beyond what is required on the NOI form – for example, information necessary to determine whether a discharge will cause or contribute to a violation of water quality standards. IDEM takes the position that, when faced with an NOI to discharge under the general permit rules it cannot consider water quality impacts of that discharge, including whether the applicant proposes to discharge pollutants into already-impaired waters. Instead, IDEM argues that it is obligated by force of law to allow the discharges to proceed under its "general permit rules."

The Indiana general permit regulations do include a "safety valve" that gives IDEM the authority to require an individual permit under certain circumstances, including when the general permit rules would allow discharges that cause or contribute to violations of water quality standards. Unfortunately, IDEM "does not automatically review the NOI to determine if any of the [conditions warranting an individual permit] apply,"[4] and does not believe that it has the authority to require applicants to produce information that might be relevant to such a determination.[5] Consequently, discharges that do not meet NPDES standards are routinely allowed under the general permit rules.

As we understand it, as a result of USEPA's scrutiny, IDEM has now taken steps to satisfy itself that it has the authority under Indiana law to write a legitimate general NPDES permit when it chooses to do so. However, IDEM does not even expect to present a draft of the coal mining general permit for public notice before the end of 2013. Meanwhile, IDEM has authorized at least 116 new or modified discharges from coal mines under Rule 7 since our groups sent the December 17, 2009 Petition, and continues to permit more illegal discharges under this rule.

As explained in our 2009 petition, the flaws in the coal mine general permit go far beyond the procedural flaws of the permit-by-rule system. The challenge to the Bear Run Mine permit deals only with the failure to apply NPDES requirements to that specific discharge, but those problems are likely to be found at most, if not all, coal mines operating under Rule 7. Therefore, a general permit must not be issued for coal mining in Indiana unless it at least: 1) is not available for discharges to impaired or high-quality waters; 2) includes an explicit provision that IDEM may request any additional information from an applicant; 3) requires the applicant to submit an analysis of pollution-reducing alternatives it considered in accordance with antidegradation rules;

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[2] Exhibit 1 at 12-15.
[3] Exhibit 1 at 8-9.
[4] Exhibit 1 at 15.
[5] Exhibit 1 at 9.

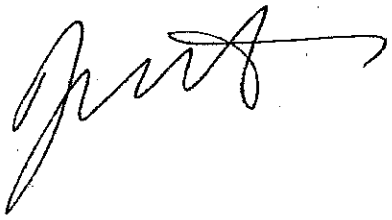
4) properly applies Indiana's variable sulfate criteria under all circumstances; 5) provides a way of calculating water-quality based effluent limits for all pollutants known to be discharged from coal mines; 6) requires the applicant to submit information IDEM can use to evaluate existing uses of the receiving waters; 7) requires identification of any specific Best Management Practices required by the permit so that such a condition is enforceable; 8) clearly states which effluent limits (e.g. acid mine drainage, alkaline mine drainage, reclamation mine drainage, etc.) apply to which outfalls; and 9) requires monitoring for pollutant parameters at least weekly when an outfall is discharging.

The Clean Water Act requires that a state that has been delegated NPDES permitting authority "shall at all times be in accordance with" the NPDES permit rules and EPA guidance, or be subject to EPA withdrawal of state authority to administer the program. 33 U.S.C. § 1342 (c). To be in compliance with NPDES permit rules, a state must have authority:

> (1) To issue permits which--
> (A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;
> (B) are for fixed terms not exceeding five years; and
> (C) can be terminated or modified for cause including, but not limited to, the following:
> (i) violation of any condition of the permit;
> (ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
> (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
> ...
> (2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act or
> (B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;
> (3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

33 U.S.C. § 1344 (1). Under 33 U.S.C. § 1342 (c)(3), USEPA must hold a hearing on this matter. The situation that we called to USEPA's attention in our Petition for Corrective Action has not been remedied, as Indiana will continue to allow illegal pollution discharges under its general permit rules for the foreseeable future. Further, we have no assurance that a procedurally proper NPDES general permit that will not violate the substantive requirements of the NPDES program will ever be adopted by IDEM. At this point, 3 ½ years after our Petition for Corrective Action was filed, Indiana continues to allow patently illegal pollution discharges under its general permit rules. It is time for USEPA to require immediate corrective action or withdraw approval of the Indiana NPDES program.

Sincerely,



Jessica Dexter
Environmental Law & Policy Center

Albert Ettinger
One of the Counsel for Sierra Club

Kim Ferraro
Hoosier Environmental Council

Bowden Quinn
Sierra Club- Hoosier Chapter

cc: Nancy Stoner, Acting Assistant Administrator for Water, U.S. EPA
Susan Hedman, Regional Administrator, Region 5, U.S. EPA
Thomas Easterly, Commissioner, IDEM
Maria Gonzalez, Associate Regional Counsel, Region 5, USEPA

Exhibit 1:

IDEM's Response to Sierra Club's Motion for Summary Judgment
February 15, 2013

STATE OF INDIANA)		BEFORE THE INDIANA OFFICE OF
)		ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)		
IN THE MATTER OF:	)	
	)	
OBJECTION TO MODIFICATION REQUEST FOR	)	
NPDES GENERAL PERMIT NO. ING040239	)	
BEAR RUN MINE-	)	Cause No. 10-W-J-4386
PEABODY MIDWEST MINING, LLC	)	
SULLIVAN, SULLIVAN COUNTY, INDIANA	)	
	)	
Sierra Club	)	
Petitioner,	)	
Peabody Midwest Mining, LLC,	)	
Permittee/Respondent,	)	
Indiana Department of Environmental Management	)	
Respondent	)	

IDEM'S RESPONSE IN OPPOSITION TO SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT

The Respondent, the Commissioner of the Indiana Department of Environmental Management ("IDEM"), by counsel, Greg Zoeller, the Indiana Attorney General, through his Deputy April Lashbrook, hereby files this Response in Opposition to Sierra Club's Motion for Summary Judgment.

IDEM respectfully requests that the Office of Environmental Adjudication ("OEA") DENY Sierra Club's Motion for Summary Judgment and find that there is no genuine issue of material fact that IDEM properly approved coverage under the general permit rules, related to the June 15, 2010 issuance of modification of coverage under general permit ING040239 and that Sierra Club fails to state a claim upon which the OEA can grant relief.

IDEM designates the following evidence in support of its Response:

Exhibit 1. Affidavit of Catherine Hess and Exhibits 1-A and 1-B.

Exhibit 2. Affidavit of Nancy King and Exhibits 2-A through 2-G.

AL/DT

Exhibit 3. Deposition of Martha Clark Mettler and Exhibits 3-1 through 3-11.

Exhibit 4. Affidavit of Niles Parker and December 17, 2009 Correspondence.

Exhibit 5. Affidavit of Niles Parker and March 10, 2010 Correspondence.[1]

Exhibit 6. All Exhibits designated by the Petitioner and by the Permittee in support or opposition of a Petition, Motion, or Response in this matter before the date this Response is filed.

PROCEDURAL POSTURE

This matter was initiated on June 30, 2010 when the Petitioners filed their Petition for Administrative Review of Bear Run Mine NPDES General Permit No. ING040239. The Petition was amended on August 12, 2010. On July 13, 2010, Peabody filed a Motion to Dismiss. On May 27, 2011, the Hoosier Environmental Council filed its Notice of Voluntary Dismissal. The Court entered an order dismissing Hoosier Environmental Council from this cause on June 28, 2011. On July 22, 2011, Sierra Club filed its motion for summary judgment. On August 22, 2011, the parties jointly moved to apply certain findings of fact and conclusions of law entered by the OEA in Cause No. 10-W-J-4350 (referred to as the "Farmersburg Case"). The Court entered Findings of Fact, Conclusions of Law and Order in accordance with the joint motion on August 24, 2011. In the Farmersburg Case, the OEA had dismissed the Petitioner's attempts to invalidate Rule 7 (327 IAC 15-7) for failure to state a claim upon which the Court could grant relief. In this case, Counts 7 and 8 also sought to invalidate Rule 7. The August 24, 2011 Order dismissed Counts 7 and 8 of the August 12, 2010, Amended Petition for Review. A dispute arose regarding the scope of OEA's *de novo* review. After briefs were filed by all parties and oral argument held, OEA issued Findings of Fact, Conclusions of Law and Order Regarding the Scope of De Novo Review before the OEA on July 10, 2012, holding that only the terms and

[1] Exhibits 1 through 5 are included on a disc enclosed with this Response, along with electronic copies of depositions of IDEM personnel taken by the Permittee in this matter.

conditions of National Pollutant Discharge Elimination System ("NPDES") General Permit No ING040239 which were modified by the June 15, 2010 modification approval are subject to review in this proceeding.

The remaining Counts[2] are:

Count One:	Failure to assure discharges will not cause or contribute to violations of water quality standards.
Count Two:	Failure to assure protection of existing beneficial uses.
Count Three:	Failure to conduct a "tier two" antidegradation analysis.
Count Four:	Improper issuance of general permit to Farmersburg Mine.
Count Five:	Failure to issue an enforceable NPDES permit.
Count Six:	Failure to require adequate monitoring of discharges and receiving waters.

STANDARD OF REVIEW

Summary judgment is appropriate if OEA finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." I.C. § 4-21.5-3-23.

Additionally, an interpretation of statutes and regulations by an administrative agency charged with the duty of enforcing those regulations and statutes is entitled to great weight, unless this interpretation would be inconsistent with the law itself. *See LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000); *see also Indiana Wholesale Wine and Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Commission*, 695 N.E.2d 99, 105 n. 16 (Ind. 1998). "When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency." *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003) (citing *Sullivan v. Day*, 681 N.E.2d 713, 716 (Ind.1997). "When a court determines that an administrative agency's

[2] IDEM does not waive its earlier argument that Counts One through Six failed to state a claim upon which relief may be granted but is merely restating the earlier decision.

interpretation is reasonable, it should 'terminate[ ] its analysis' and not address the reasonableness of the other party's interpretation." *Id.* at 1076-1077 (citing *Ind. Wholesale Wine,* 695 N.E.2d at 105). "Terminating the analysis recognizes 'the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.'" *Id.* at 1077 (citing *Ind. Wholesale Wine,* 695 N.E.2d at 105).

UNCONTROVERTED FACTS

IDEM approved the initial Notice of Intent ("NOI") for a new general permit for Black Beauty Coal Company Bear Run Mine, ING040239, on May 15, 2009. *See* Exhibit 1-B. This NOI corresponded to the areas included within Indiana Department of Natural Resources Surface Mining Control and Reclamation Act ("I-SMCRA") Permit Nos S-0256, S-0256-1, S-0256-2, S-0256-3, and S-0256-4 and requested that eighteen outfalls previously covered under general permit ING040127 be covered under the new general permit coverage under ING040239. *See* Exhibit 1-B. Black Beauty Coal Company, LLC, was the predecessor of Peabody. Coverage under ING040239 is effective through May 31, 2014. *See* Exhibit 1-A. No Petition for Administrative Review was filed with regard to the initial coverage under general permit ING040127, effective May 15, 2009. On October 15, 2009, IDEM approved an NOI to modify coverage under ING040239 by deleting coverage for Outfall 018, which was removed for railroad construction, and which discharge was covered by existing Outfall 047. *See* Exhibit 1-B. On May 15, 2010, IDEM approved modification of general permit coverage under ING040239 by adding one new outfall, Outfall 019, which would discharge to an unnamed tributary to Black Creek. *See* Exhibit 1-B. On June 15, 2010, IDEM's Office of Water Quality, NPDES Permit Section issued a letter granting approval of three modification requests dated

March 25, 2010, April 12, 2010, and April 27, 2010, adding two new outfalls for coverage (Outfalls 016R and 018R), activating two outfalls which had previously been approved but which had not yet been constructed (Outfalls 041N and 042); changing the mine drainage status for Outfalls 045, 046, 049, and 050 from Undetermined to Alkaline, deleting one unconstructed outfall, Outfall 041S, from coverage because of a determination that it was not needed, and adding but not activating new unconstructed alkaline mine drainage status Outfalls 009, 011, and 053 through 063. *See* Exhibit 1-A. As of June 15, 2010, thirty-two (32) outfalls were permitted to discharge to Buttermilk Creek, an unnamed tributary to Black Creek, an unnamed tributary to Middle Fork Creek, an unnamed tributary to Spencer Creek, Spencer Creek, an unnamed tributary to Pollard Ditch, and an unnamed tributary to Maria Creek under General Permit ING040239. *See* Exhibit 1-A. Three outfalls had previously been included in the general permit coverage to discharge to the same receiving streams under ING040239. *See* Exhibit 1-A. IDEM followed the requirements set forth in 327 IAC Article 15, Rule 7, in approving this modification of coverage for the Bear Run Mine.

ARGUMENT

Sierra Club is petitioning for review in the wrong forum of the wrong issues at the wrong time. Sierra Club's Amended Petition for Review and Memorandum in Support of Summary Judgment can be construed as comprising two separate and distinct issues: 1) Sierra Club argues that by approving modification of permit coverage under Rule 7 for the Bear Run Mine, IDEM failed to meet various requirements of the Clean Water Act ("CWA") (described in Counts One, Two, Three, Five, and Six); and, 2) Sierra Club argues that IDEM should have required the Bear Run Mine to apply for an individual permit (Count Four). There is no genuine issue of material fact with regard to the first issue: IDEM, as a delegated authority for the NPDES program,

followed all of the requirements of Rule 7 in approving the modification and is therefore entitled to judgment as a matter of law upholding said approval. The specific terms of Rule 7 cannot be challenged in this proceeding, so the OEA must presume that Rule 7 meets the requirements of the CWA. IDEM believes that the second issue is not ripe for review by OEA because IDEM has never made a decision with regard to whether the Bear Run Mine should apply for an individual permit. If IDEM were to make such a decision, however, this decision would be subject to review by OEA (under AOPA, at the request of any aggrieved or affected party, including the permittee), and, in order to require application for an individual permit by the Bear Run Mine, IDEM would have to show that one of the factors in 327 IAC 15-2-9(b) applies to the discharge. In this situation, IDEM concurs with Peabody that none of the factors apply that would allow IDEM to require Peabody to apply for an individual permit for the Bear Run Mine.

I. There is no genuine issue of material fact as to whether IDEM followed all of the requirements of Rule 7 in approving the modification of coverage under ING040239.

A. When reviewing a Notice of Intent for coverage under the general permit rule, IDEM, and thus, OEA, is limited to considering in its review the provisions of Indiana Code and 327 IAC Article 15.

It is a "keystone of administrative law" that agency authority is derived solely from enabling statutes. *Indiana State Board of Embalmers and Funeral Directors v. Kaufman*, 463 N.E.2d 513, 521 (Ind. Ct. App. 1984). Administrative agencies have *only* the powers granted to them by the General Assembly. *Ind. Dept. State Revenue v. Bulkmatic Transport Co.*, 648 N.E.2d 1156, 1160 (Ind. 1995). *See also Smith v. Thompson Const. Co.*, 69 N.E.2d 16, 17 (1946), ("[s]ince the [Industrial Board of Indiana] derives its authority from the statutes, it can do the things authorized by the Legislature and beyond that it cannot legally go."); *Indiana Air Pollution Control Bd. v. Richmond*, 457 N.E.2d 204, 207 (Ind. 1983), ('[u]nder Indiana law an

administrative agency has only such power as its creating statute has bestowed upon it. Any act of such administrative agency for which there is no authority in its governing statute is void and of no effect."); *Indiana State Bd. Of Pub. Welfare v. Tioga Pines Living Ctr.*, 622 N.E.2d 935, 939 (Ind. 1993)("It is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute...").

In 1994, the Water Pollution Control Board added Rules 7-12 to Article 15 of 327 IAC. *See* 327 IAC 15-7 through 15-12; *See* Exhibit 2-D; 2-E; 2-F.[3] Rule 7 was written with the intent to meet NPDES requirements, including ensuring state water quality standards are met when permits are issued. *See* Exhibits 2-E, p. 9, 14; 2-F, p. 2-3.

> The purpose of [327 IAC Article 15] is to establish NPDES general permit rules for certain classes or categories of point source discharges by prescribing the policies, procedures, and technical criteria to operate and discharge under the requirements of a NPDES general permit rule. Compliance with all requirements of applicable general permit rules may obviate the need for an individual NPDES permit issued under 327 IAC 5.
>
> 327 IAC 15-1-1.
>
> (a) The commissioner may regulate the following discharges under NPDES general permit rules:
> (1) Point source discharges of storm water associated with industrial activity as defined in 40 CFR 122.26(b)(14) as published in the Federal Register on November 16, 1990.
> (2) Such other categories of point sources operating within the state that:
> (A) involve the same or substantially similar types of operations;
> (B) discharge the same types of wastes;
> (C) require the same effluent limitations or operating conditions; and
> (D) require the same or similar monitoring requirements.
>
> 327 IAC 15-2-2.
>
> The purpose of this rule is to regulate wastewater discharges from surface mining, underground mining, and reclamation projects which utilize sedimentation basin treatment for pit dewatering and surface run-off and to require best management practices for storm water run-off so that the public health, existing water uses, and aquatic biota are protected.
>
> 327 IAC 15-7-1.

The discharges at issue here are discharges of stormwater associated with coal mining, which is an industrial activity as defined in 40 CFR 122.26(b)(14). In order to approve coverage

[3] During that rulemaking process, the Hoosier Environmental Council provided comments arguing that IDEM should not allow general permitting for coal mines. *See* Exhibit 2-F, p. 9-10.

under the general permit rule for wastewater associated with coal mining, IDEM is limited to consideration of four (4) issues. *See* 327 IAC 15-7-5(c).

First, IDEM must determine whether the applicability requirements found in 327 IAC 15-7-3 and 327 IAC 15-2-3 are satisfied. Generally, these rules state the existence of NPDES general permits in Indiana, and state that NPDES general permittees are governed by more specific rules. Second, IDEM must determine whether the NOI letter requirements found in 327 IAC 15-3-2 are met:

> Sec. 2. Except for permittees covered under 327 IAC 15-5 and 327 IAC 15-13 and as provided in 327 IAC 15-14-4, the NOI letter shall include the following:
>
> (1) Name, mailing address, and location of the facility for which the notification is submitted.
> (2) Standard Industrial Classification (SIC) codes, as defined in 327 IAC 5, up to four (4) digits, that best represent the principal products or activities provided by the facility.
> (3) The person's name, address, telephone number, e-mail address (if available), ownership status, and status as federal, state, private, public, or other entity.
> (4) The latitude and longitude of the approximate center of the facility to the nearest fifteen (15) seconds, and, if the section, township, and range are provided, the nearest quarter section in which the facility is located.
> (5) The name of receiving water, or, if the discharge is to a municipal separate storm sewer, the name of the municipal operator of the storm sewer and the ultimate receiving water.
> (6) A description of how the facility complies with the applicability requirements of the general permit rule.
> (7) Any additional NOI letter information required by the applicable general permit rule.
> (8) The NOI letter must be signed by a person meeting the signatory requirements in 327 IAC 15-4-3(g).
>
> *(Water Pollution Control Division; 327 IAC 15-3-2; filed Aug 31, 1992, 5:00 p.m.: 16 IR 19; errata filed Sep 10, 1992, 12:00 p.m.: 16 IR 65; readopted filed Jan 10, 2001, 3:23 p.m.: 24 IR 1518; filed Oct 27, 2003, 10:15 a.m.: 27 IR 832; filed Dec 18, 2003,10:39 a.m.: 27 IR 1563; readopted filed Nov 21, 2007, 1:16 p.m.: 20071219-IR-327070553BFA)*

Third, IDEM must determine whether the NOI requirements found in 327 IAC 15-7-5(a) are satisfied, which include:

> (a) In addition to the NOI letter requirements contained in 327 IAC 15-3, a person regulated under this rule must submit with the NOI letter requirements under this rule the following information:
>
> (1) The discharge location of each outfall, including each outfall regulated under section 7(b)(6) of this rule and its associated receiving stream.
> (2) An identifying outfall number. The numbering shall start at 001 for the first outfall, 002 for the second outfall, and continue in that manner until all outfalls are numbered. The sequential number assigned to any outfall identified under section 7(b)(6) of this rule shall be preceded by an "S".
> (3) For each numbered outfall, identify the mine drainage status regulated under section 7(a)(1) through 7(a)(4) of this rule. For numbered outfalls regulated under section 7(b)(6) of this rule, identify the outfall as discharging storm water.
> (4) The dry weather base flow value for each numbered outfall regulated under section 7(a)(1) through 7(a)(4) of this rule.

> (5) A topographical map identifying the location of the coal mining operation, the receiving streams, and the location of each numbered outfall.

327 IAC 15-7-5(a). Finally, IDEM must publish notice of its approval of coverage under the general permit rule. *See* 327 IAC 15-7-5(c)(2); Sierra Club's July 2, 2010 Petition, Attachment 4. Sierra Club's allegations do not address *any* of these limited issues. If a permittee meets these requirements, 327 IAC 15-7-7(a) states that "a person regulated under this rule is authorized to discharge through the outfalls identified in the NOI letter in accordance with this rule."

The NOIs submitted by Peabody for the Permit Modification approved by IDEM on June 15, 2010 are attached to the Affidavit of Catherine Hess as Exhibit 1-A. They meet all of the requirements in the applicable rules. The Sierra Club has not alleged that these NOIs do not meet the requirements of 327 IAC 15-7, *et seq.* and 327 IAC 15-2-3. In order to authorize discharging under the general permit rule, IDEM can only require submittal of the information that is required by the general permit rules. With regard to a modification of coverage under a general permit, pursuant to 327 IAC 15-7-5(c), IDEM is similarly limited. The Sierra Club has made many claims, but none of its claims apply to the agency action–the modification—that is at issue here.

> Just as the IDEM does not have the authority to act in a manner inconsistent with the authority explicitly granted to it by the legislature, neither can the OEA. "An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law." *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003).* IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations. The IDEM may only consider those factors specified in the applicable regulations in deciding whether to issue a permit. As the ultimate authority for the IDEM, the OEA's authority is limited by statute (I.C. § 4-21.5-7-3) to determining whether the IDEM decision complies with the applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues, the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues.

See Springfield Environmental General Partnership, 2012 OEA 45.

The OEA may only review IDEM's approval of this modification of coverage under the general permit rule to determine whether it conforms to the applicable standards and

requirements established by the Indiana General Assembly and the Water Pollution Control Board. The OEA cannot invalidate IDEM's authorization to discharge pursuant to Rule 7, or vacate this modification of coverage if it finds that IDEM has followed all of the requirements of Rule 7 in authorizing the discharge.

To prevail on the merits of this case, the Sierra Club must show that IDEM did not follow the applicable regulations for general permits as stated in 327 IAC 15-7 in the authorization issued to the Permittee for modification of coverage under ING040239. The OEA can only review IDEM's decisions to determine whether IDEM acted in conformity with controlling statutes and regulations. *See Luce Township Regional Sewer District*, 2011 OEA 141. Since there is no genuine issue of material fact with regard to IDEM's compliance with the applicable rules for authorizing modifications of coverage under the general permit rules related to discharges of wastewater from coal mines, IDEM is entitled to judgment as a matter of law in its favor.

B. Reviewing IDEM's NPDES program to determine whether it meets the requirements of the Clean Water Act is beyond the scope of OEA's review.

Sierra Club's primary arguments—that IDEM didn't comply with various NPDES requirements related to maintaining water quality standards, existing beneficial uses, and ensuring an antidegradation review is completed when authorizing the Bear Run Mine to discharge—are attacks on Indiana's general permit program and are not appropriate for consideration in this forum.[4] 33 USC § 1342 provides that a state NPDES program is subject to the review and approval by USEPA, which may be withdrawn. *See* 33 USC § 1342(c)(3). IDEM originally received approval of its NPDES program in 1975, and IDEM's NPDES general

[4] These attacks are also not appropriate at this time, because the initial authorization to discharge was in 2009, and at issue in this proceeding is only a modification of coverage. These arguments are the wrong issues, made at the wrong time, in the wrong forum.

permit program was approved by USEPA in 1991. *See* Exhibits 2-A; 2-B; 2-C. The USEPA has had the opportunity to provide comments to IDEM during the rulemaking process for Rule 7, but failed to do so. *See* Exhibit 2. In fact, the USEPA stated, in a 1990 letter regarding the proposed general permit rules, that the factors under which IDEM could require an individual permit for a discharger otherwise covered under a general permit were "more stringent than federal law." *See* Exhibit 2-C.

The Sierra Club has recently initiated a petition to the USEPA for corrective action on Indiana's NPDES program. *See* Exhibit 4. IDEM provided a response on March 10, 2010. *See* Exhibit 5. Pages 5-17 of Sierra Club's Memorandum in Support of Summary Judgment reiterate the claims made in this petition to USEPA, which is an attack on Indiana's general permit program and specifically 327 IAC Article 15-7. On p. 2 of its Memorandum in Support of Summary Judgment, Sierra Club admitted that it believes that Rule 7 is inadequate. This proceeding before the OEA to challenge the June 10, 2010 modification of coverage is merely a back-door attempt to have the OEA review Rule 7. The Sierra Club knows that the OEA is not the proper forum for these complaints; USEPA or U.S. District Court would be appropriate forums for the Sierra Club to bring these complaints. USEPA's review of Sierra Club's Petition continues independently from this matter and should have no bearing on the OEA's review of IDEM's actions regarding this modification of coverage.

IDEM acknowledges that USEPA has had issues with certain aspects of IDEM's general permitting program. *See* Exhibits 3-8; 3-9. IDEM is addressing those issues by amending 327 IAC Article 15. *See* Exhibit 2-G; Exhibit 3-11. Counsel for the Sierra Club has provided comments as part of that rulemaking and several of the issues raised by the Sierra Club in this proceeding are being addressed by that rulemaking. But in this proceeding, the OEA can only

review IDEM's actions with regard to whether it followed Rule 7 when it approved *this modification.*

I.C. 4-21.5-7-3(a) states that the OEA is established to "review, under this article, agency actions of the department of environmental management, actions of a board described in IC 13-14-9-1, and challenges to rulemaking actions by a board described in IC 13-14-9-1 made pursuant to IC 4-22-2-44 or IC 4-22-2-45." Although Sierra Club tries to argue that this specific modification of coverage under a general permit was invalid, and it denies that it is attacking Rule 7, the nature of Sierra Club's arguments show that it believes that Rule 7 does not meet NPDES requirements, and it urges OEA to invalidate IDEM's authorization for this discharge under Rule 7. *See* Sierra Club's Memorandum in Support of Summary Judgment, p. 10, ¶ 3; p. 21, ¶ 2; p. 22, ¶ 2. But these arguments are beyond the scope of OEA's review in this matter because there is no genuine issue of material fact as to whether IDEM followed all of the requirements of Rule 7 when approving this modification of coverage.[5]

If the OEA finds that IDEM was required to do anything in addition to what is required by Rule 7 or the other rules promulgated by the Water Pollution Control Board relating to the approval of coverage under a general permit, such a finding would be in excess of OEA's statutory authority in this proceeding.

C. As the more specific rule, Rule 7 prevails under the rules of statutory construction over the general rules requiring that each permit ensure "compliance with all applicable requirements of the Clean Water Act."

As the delegated authority implementing the CWA, IDEM intends for each permit it issues to meet the requirements of the CWA. *See* Exhibit 2-A; 2-B; 2-C; 2-D; 2-E; 2-F and 2-G. Rule 7 is the means by which IDEM specifically implements CWA requirements for permittees

[5] *See* the Sierra Club's Reply to Peabody's and IDEM's Responses Regarding the Scope of OEA's De Novo Review: "[This] permit appeal is not [] a challenge to whether the blanks on the NOI form were filled out correctly."

seeking coverage for discharges of stormwater associated with sedimentation basins at surface and underground coal mines:

> The purpose of this rule is to regulate wastewater discharges from surface mining, underground mining, and reclamation projects which utilize sedimentation basin treatment for pit dewatering and surface run-off and to require best management practices for storm water run-off so that the public health, existing water uses, and aquatic biota are protected.

327 IAC 15-7-1. There is no issue regarding whether these types of discharges are covered under this approval of a modification of coverage under ING040239. Rule 7 specifically addresses these types of discharges.

The Sierra Club argues that, by authorizing discharges under this modification of general permit coverage for the Bear Run Mine, IDEM did not follow 327 IAC 5-2-10 and federal law by ensuring that each "NPDES permit shall provide for and ensure compliance with all applicable requirements of the CWA, regulations promulgated under the CWA, and state law." *See* Sierra Club Memorandum in Support, p. 8. It would seem, then, that Sierra Club is arguing that 327 IAC 5-2-10 and 327 IAC 15, Rule 7, are in conflict.

To resolve issues of statutory construction, OEA has agreed that "the same rules that govern construction of statutes also govern construction of rules. As the court stated in *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996):

> Our inquiry into the meaning of Rule 28's prohibition ... begins with a recognition that rules which apply to the construction of statutes also apply to the construction of administrative rules and regulations. *Indiana Dep't of Natural Resources v. Peabody Coal Co.* (1995) Ind. App., 654 N.E.2d 289. Of course, properly adopted administrative rules and regulations have the force and effect of law. *Dep't of Fin. Inst. v. Johnson Chev. Co.* (1950) 228 Ind. 397, 92 N.E.2d 714.

See In re: Seagrams & Sons, 2004 OEA 58. Further,

> When construing a statute or regulation, the Court must apply certain rules of statutory construction. The first rule is that when a statute or regulation is clear and unambiguous on its face, the court does not need to "apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense." *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-704 (Ind. 2002); *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14 (Ind.Ct.App. 2004); I.C. § 1-1-4-1(1). If the court determines that the wording of the rule or statute is unambiguous, it is not subject to interpretation. The Court may consult with English

> language dictionaries to ascertain a word's common and ordinary meaning. *Fort Wayne Patrolmen's Benevolent Ass'n v. City of Fort Wayne*, 903 N.E.2d 493 (Ind. Ct. App. 2009).
>
> However, if the Court determines that there is ambiguity, then other rules of statutory construction shall be applied. "If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience." *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003). "The meaning and intention of the legislature are to be ascertained not only from the phraseology of the statue but also by considering its nature, design, and the consequences which flow from the reasonable alternative interpretations of the statute." *State v. Hensley*, 716 N.E.2d 71, 76 (Ind. Ct.App. 1999).

See Boerman Carroll Dairy, LLC, 2010 OEA 191.

It is a basic rule of statutory construction that statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious system. *See Economy Oil Corp. v. Indiana Department of State Revenue*, (1974) 162 Ind.App. 658, 664, 321 N.E.2d 215, 218. It is also elementary that where one statute deals with a subject in general terms and another statute deals with a part of the same subject in a more detailed or specific manner, the two should be harmonized, if possible. However, if they are in irreconcilable conflict then the more detailed will prevail as to the subject it covers. *See Economy Oil, supra. See also State ex rel. Eastern Pulaski Community School Corp. et al v. Pulaski Circuit Court et al*, (1975) 264 Ind. 37, 338 N.E.2d 634; *State ex rel. Schuerman v. Ripley County Council*, 182 Ind. App. 616, 619, 395 N.E.2d 867, 869 (1979); *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984).

Here, 327 IAC 5-2-10 follows 327 IAC 5-2-1, which states:

> This rule defines the general programmatic requirements of a pollutant discharge permit system to be administered by the commissioner consistent with the NPDES requirements set forth in Sections 118, 318, 402, and 405 of the Clean Water Act and federal regulations adopted pursuant thereto.

327 IAC 15 begins with:

> The purpose of this article is to establish NPDES general permit rules for certain classes or categories of point source discharges by prescribing the policies, procedures, and technical criteria to operate and discharge under the requirements of a NPDES general permit rule.

To construe 327 IAC 5-2-10 and 327 IAC 15-7 harmoniously, OEA need only agree that Rule 7 is the specific implementation of 327 IAC 5-2-10. As the more specific rule, intended to deal with specific classes or categories of point source discharges within the NPDES program, the provisions of 327 IAC 15, Rule 7 prevail as to the specific discharges it covers, over the more general, "programmatic" requirements described in 327 IAC 5-2-10. Such an interpretation would be in accordance with the rules of statutory construction. The rules should be construed together, and because IDEM's issuance of the approval of the modification of coverage met all of the requirements of Rule 7, it must be upheld.

II. It is not ripe for OEA to make a decision regarding whether any of the factors allowing the Commissioner to require an individual permit for the Bear Run Mine, listed in 327 IAC 15-2-9(b), apply, in advance of such a decision being made by IDEM.

In Section V, page 18, of its Memorandum in Support of Summary Judgment, and in Count Four of its Amended Petition, the Sierra Club correctly states that Indiana's General Permit requirements contain a provision that gives IDEM the discretion to require a discharger to apply for an individual permit.[6] But the discretion initially belongs to the IDEM and not to the OEA. The Sierra Club is arguing that the OEA act when the Commissioner has not made any determination with regard to issuing an individual permit for the Bear Run mine. There has been no decision of IDEM stating that it is exercising its discretion under 327 IAC 15-2-9(b), and when IDEM makes a determination on an NOI, it does not automatically review the NOI to determine if any of the six 327 IAC 15-2-9(b) situations apply. *See* Exhibit 1, ¶ ¶ 9-11. The facts relating to whether IDEM should require an individual permit for the Bear Run Mine were never before IDEM because the only issue before it, relating to this Petition for Review, was

[6] Sierra Club clearly states, on p. 2 of its Reply to Peabody's and IDEM's Response Regarding the Scope of OEA's De Novo Review, that this "permit appeal is not [] a petition for an individual permit." Because the Petitioner has stated that this appeal is not a petition for an individual permit, OEA should not undertake a review of whether an individual permit should be required under 327 IAC 15-2-9.

whether the modification of coverage should be approved under ING040239.[7] Therefore, determining whether any of the six 327 IAC 15-2-9(b) situations apply is not ripe for OEA's review.

> Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record. *Since the Commissioner has not even begun the decision-making process* regarding Chemwaste's application, IDEM asserts that there exists nothing for a court to review. IDEM claims that since Chemwaste has neither been denied a permit nor had an opportunity to exhaust administrative remedies, judicial intervention is unwarranted.

See Indiana Dept. of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331, 336 (Ind. 1994) (emphasis added). Likewise, IDEM has not begun the decision-making process with regard to whether an individual permit is appropriate for the Bear Run Mine because that issue was never before it. There is nothing for OEA to review.

> Black's Law Dictionary states that ripeness is the "circumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." *Cf. Meinders v. Weber*, 604 N.W.2d 248, 263 (S.D.2000) ("Ripeness involves the timing of judicial review and the principle that judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.") (citation and internal quotation omitted). When ruling upon a ripeness challenge, the Court must consider: (1) "the fitness of the issues for judicial decision"; and (2) "the hardship to the parties of withholding court consideration." *Rene ex rel. Rene v. Reed*, 726 N.E.2d 808, 822 (Ind.Ct.App.2000) (citation omitted).

See Carroll County Rural Elec. Membership Corp. v. Indiana Dept. of State Revenue, 733 N.E.2d 44 (Ind. T.C. 2000).

As discussed above, the OEA is established under 4-21.5-7-3(a) to review agency actions of IDEM. There is no statutory or regulatory provision allowing OEA to determine whether an individual permit is more appropriate for a given discharger absent a decision by IDEM to do so.

327 IAC 15-2-9(b) states:

> The commissioner may require any person either with an existing discharge subject to the requirements of this article or who is proposing a discharge that would otherwise be subject to the requirements of this article to apply for and obtain an individual NPDES permit if one (1) of the six (6) cases listed in this

[7] The right time for a petitioner to request an individual permit would be at the time of initial permit coverage or renewal. Renewal of coverage under this general permit is scheduled to occur in 2014. Also, many of the issues that Sierra Club has raised in this proceeding would be more appropriate to bring during the public comment period for the general permits, scheduled to be administratively-issued when the general permit rules are revised.

subsection occurs. Interested persons may petition the commissioner to take action under this subsection. Cases where individual NPDES permits may be required include the following:

(1) The applicable requirements contained in this article are not adequate to ensure compliance with:

(A) water quality standards under 327 IAC 2-1 or 327 IAC 2-1.5; or

(B) the provisions that implement water quality standards contained in 327 IAC 5.

(2) The person is not in compliance with the terms and conditions of the general permit rule.

(3) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants from the point source.

(4) Effluent limitations guidelines that are more stringent than the requirements in the general permit rule are subsequently promulgated for point sources regulated by the general permit rule.

(5) A water quality management plan containing more stringent requirements applicable to such point source is approved.

(6) Circumstances have changed since the activity regulated under this article began so that the discharger is no longer appropriately controlled under the general permit rule or either a temporary or permanent reduction or elimination of the authorized discharge is necessary.

In seeking for the OEA to require that Peabody apply for an individual permit for the Bear Run Mine, the Sierra Club is attempting to make an end-run around IDEM and asking the OEA to exceed its statutory authority.

Nevertheless, although the Commissioner has not yet made a determination, and therefore, there is nothing for OEA to review, IDEM concurs with Peabody Midwest Mining's position that the facts described in its Memorandum in Opposition to Sierra Club's Motion for Summary Judgment and Designated Evidence show that none of the six (6) factors described in 327 IAC 15-2-9 (b) apply here, and that IDEM cannot require Peabody to apply for an individual permit for the Bear Run Mine.

CONCLUSION

There is no genuine issue of material fact with regard to whether IDEM followed the requirements of Rule 7 in approving modification of coverage under permit ING040239; OEA should uphold IDEM's approval. With regard to whether an individual permit should be required for the Bear Run Mine, that issue is not ripe for review because OEA cannot make a determination that the agency has not yet made.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the below-named counsel by First Class United States Mail, prepaid, this 15th day of Feb, 2013.

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